



The Special Administrative Law Judge found that claimant, on June 20, 1991, suffered personal injury by accident arising out of and in the course of his employment with the respondent which resulted in a sprain to the low back and a five percent (5%) permanent partial impairment of function to the body as a whole. The claimant requested this review by the Appeals Board and contends that claimant suffered a disc herniation on the date of the accident and a work disability much greater than the impairment of function rating. The sole issue before the Appeals Board is nature and extent of disability. The findings of the Special Administrative Law Judge pertaining to other issues addressed by him are hereby adopted by the Appeals Board.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire record, the Appeals Board finds, as follows:

(1) For the reasons expressed below, the Award of the Special Administrative Law Judge granting claimant permanent partial general disability benefits based upon a five percent (5%) permanent partial impairment of function rating should be affirmed.

On June 20, 1990, claimant began experiencing pain in his low back when he was hanging wheels on a conveyor line. Claimant reported his injury to the respondent and was sent to the company doctor who felt that claimant had experienced a muscle pull. Claimant never returned to work for Superior, but several weeks later began working for a company that installed aerial television cable. From the record, it appears that claimant installed cable from approximately July 1990 until October 1990.

Claimant testified that when he began the cable installation job his pain had diminished and that he was able to climb approximately ten (10) telephone poles per day, trim trees and earn approximately \$100.00 per day. Claimant testified that while working for this company his symptoms progressively worsened. For reasons not related to his back condition, claimant quit working for the cable company. In approximately January 1991, claimant began working on a part-time basis for a construction company that erected metal buildings. Claimant testified that he primarily applied siding and doors and earned \$5.25 per hour. Claimant testified that his symptomatology in his back and leg increased while working for the construction company and caused him to seek additional medical treatment in February or March 1991. Claimant ultimately came under treatment from Dr. Hanson of Fort Scott who operated on claimant's back in April 1991 to remove a herniated disc. Claimant could not identify any specific incident while working for the cable television or construction company that he felt caused injury to his back.

The issue now before the Appeals Board is the nature and extent of injury and disability that claimant experienced as a result of his work-related accident on June 20, 1990, while working for the respondent. None of the treating physicians testified. Claimant's and respondent's medical experts provided contradictory testimony. At his attorney's request, claimant was examined on October 15, 1991, by orthopedic surgeon Forney Fleming, M.D. Dr. Fleming believes that claimant's history is compatible with disc herniation having occurred on June 20, 1990 and believes that claimant post-surgery has experienced a ten percent (10%) impairment to the body as a whole. Dr. Fleming testified that claimant's climbing telephone poles and engaging in steel construction work during the interim between the date of accident in June 1990 and the surgery in April 1991 is not incompatible with a disc herniation as a person's functional ability is dependent upon numerous factors, not the least of which is the person's ability to live and function with pain. Dr. Fleming believes that claimant sustained an aggravation and perhaps additional

herniation to his disc in January 1991 based upon claimant's history of increased symptomatology. However, Dr. Fleming is unable to quantify the various episodes of aggravation or worsening of claimant's symptomatology or the extent of aggravation that was impacted upon claimant's permanent impairment of function due to the aggravation of January 1991. Dr. Fleming cannot say what impairment rating claimant would have had prior to January 1991 or the restrictions he would have given claimant if he would have seen him after the initial incident of June 1990. Respondent's medical expert, Harold E. Goldman, M.D., examined claimant on June 22, 1992, and testified that claimant's work activities subsequent to the June 1990 incident were incompatible with a herniated disc, and that he believes that the injury at respondent's was minor and has no relationship with the disc herniation that was first found in March 1991. Dr. Goldman, who is board-certified in the areas of electroencephology and electromyography, finds no evidence of any residuals from claimant's laminectomy and disc incision at L5-S1 and no evidence of permanent disability. However, Dr. Goldman would agree with the impairment rating set forth by the AMA Guides for a surgically treated disc with no residual symptoms.

The burden of proof is upon the claimant to establish the nature and extent of disability that he has experienced as a result of his work-related accident. The claimant's own medical expert is unable to express an opinion within a reasonable degree of medical probability pertaining to claimant's impairment of function or work restrictions and limitations as a result of the incident on June 20, 1990. When considering the evidence as a whole, the Appeals Board finds that claimant, subsequent to the incident at respondent's, did engage in heavy physical labor which would be sufficient in and of itself to cause disc herniation or, at the very least, aggravation of a pre-existing condition. Based upon the testimony of the medical expert witnesses, claimant's permanent impairment of function rating falls in the range of zero to ten percent (0-10%) depending upon which doctor is asked. Considering the record as a whole, the Appeals Board finds that claimant has experienced injury as a result of the incident on June 20, 1990, that constituted a whole-body impairment of function of five percent (5%) for which the claimant should be awarded permanent partial general disability benefits. The Appeals Board finds that claimant's true impairment of function rating lies somewhere between the extremes and that five percent (5%) is reasonable in light of the facts and circumstances herein. The ultimate decision concerning the nature and extent of the disability is for the trier of fact. As the Court decided in Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991), it is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and others in making a determination on the issue of disability. This is what the Appeals Board has done in this instance.

(2) The Appeals Board adopts the findings and conclusions of the Special Administrative Law Judge as contained in his Award that are not inconsistent to those set forth herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated July 12, 1994, should be, and hereby is, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1994.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Carlton W. Kennard, PO Box 1449, Pittsburg, KS 66762  
John I. O'Connor, PO Box 1236, Pittsburg, KS 66762  
William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director